



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lewis, Oberly, Sloan & Associates, P.C.

File: B-266164

Date: January 11, 1996

Robert F. Lewis and Harry Sloan for the protester.

James L. Weiner, Esq., Department of the Interior, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee does not satisfy Buy Indian Act set-aside eligibility requirements is denied where the Bureau of Indian Affairs reasonably found that the awardee corporation is owned and controlled by a certified Indian, who will be responsible for the management and conduct of the awarded contract.

DECISION

Lewis, Oberly, Sloan & Associates protests the award of a contract to Dan D. Griffin, P.C., C.P.A., under request for proposals (RFP) No. 1450-K00-95-002, issued as a total set-aside for Indian-owned and controlled concerns by the Bureau of Indian Affairs (BIA), Department of the Interior, for the performance of compliance audits and internal control reviews for BIA's Office of Trust Funds Management. The protester contends that Griffin is not an Indian economic enterprise as required by the RFP.

We deny the protest.

The RFP was issued as a total set-aside for Indian-owned and controlled concerns pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1994). The RFP required that each offeror certify that it was an "eligible Indian economic enterprise." The RFP stated that the term "'[e]ligible' means that the majority owner of an Indian economic enterprise . . . meets both the definitions 'Indian' and of 'Indian economic enterprise'" as set forth in this portion of the RFP. The RFP defined "Indian" as "a person who is a member of an Indian tribe, as defined herein," and defined "Indian tribe" as "any Indian tribe, band, nation, rancheria, pueblo, colony, Alaska native village, or community which is recognized by the U.S. Government through the Secretary [of the Interior] as eligible for the special programs and services provided by the Secretary to Indians because of their status as Indians." The RFP defined "Indian Economic Enterprise" as a business entity which: (1) is at least 51 percent owned by one or more individuals qualifying as Indians; (2) has one or more of the

Indian owners involved in the daily business management of the enterprise; and (3) has the majority of the enterprise's earnings accrue to such Indian persons.

The agency received two offers, those of the protester and Griffin, by the RFP's closing date. In their offers, both the protester and Griffin certified that they were eligible Indian economic enterprises. The proposals were evaluated by a technical evaluation board (TEB), and the agency issued an amendment to the RFP, which, among other things, requested the submission of best and final offers (BAFO). After the BAFOs were evaluated, the TEB recommended that award be made to Griffin. The agency conducted a pre-award survey of Griffin at that firm's office, during which the agency asked Dan Griffin, the owner, a number of questions and requested the submission of certain documents bearing on the firm's eligibility as an Indian economic enterprise. The agency subsequently determined that Griffin was eligible for award, and awarded the firm a contract on September 1, 1995.

The protester argues that the agency erred in determining that Griffin is an eligible Indian economic enterprise. Specifically, the protester argues that Mr. Griffin is not an "Indian," as that term is defined in the RFP, and that because Griffin, as provided in its proposal, will subcontract much of the work required by the contract to Arthur Andersen, L.L.P., Griffin will neither manage the contract nor receive the majority of the profit generated by the contract.

The Buy Indian Act, 25 U.S.C. § 47, provides that:

"So far as may be practicable Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

The Secretary of the Interior, acting through the BIA, has broad discretionary authority to implement this statute; defining the criteria that a firm must meet to be eligible for award under a Buy Indian Act set-aside, and determining the quantum of evidence necessary to establish compliance with those criteria falls within that broad discretion. Tomahawk Constr. Co., B-254938, Jan. 27, 1994, 94-1 CPD ¶ 48; Cheyenne, Inc., B-260328, June 2, 1995, 95-2 CPD ¶ 117. Consequently, we will only disturb a BIA conclusion regarding a firm's eligibility where it is shown to be arbitrary, unreasonable, or in violation of law or regulation.

The record shows that BIA had persuasive evidence of Mr. Griffin's status as an "Indian," and his corporation's eligibility, in the context of this procurement, as an "Indian Economic Enterprise."

With regard to Mr. Griffin's status as an "Indian," in addition to the Buy Indian Certification Statement submitted with the proposal, Mr. Griffin provided his membership card from the Cherokee Nation, signed by both the Tribal Registrar and Principal Chief, and a certification from the cognizant BIA office that Mr. Griffin "is 1/4 degree Indian blood of the Cherokee Tribe."

With regard to the firm's status as an eligible Indian economic enterprise, the agency concluded that Mr. Griffin had ownership and control of Dan D. Griffin, P.C., CPA, and that his corporation would perform the majority of the work and would receive the majority of the earnings under the contract. In this regard, Mr. Griffin provided the articles of incorporation for Dan D. Griffin, P.C., Certified Public Accountant, which provide that Mr. Griffin is the corporation's registered agent, as well as the corporation's by-laws and a resolution adopted by the corporation's board of directors, which provide that Mr. Griffin is the president of the corporation and sole member of its board of directors. The agency also verified during its pre-award survey interview with Mr. Griffin and from a copy of Griffin's teaming agreement with its subcontractor, Arthur Andersen, that in performance of the contract, Mr. Griffin, as stated in Griffin's proposal, will have overall project management responsibility and final decision-making authority, including the control of and follow-up on all project activities, including the work performed by Arthur Andersen.

Certifications and determinations from the cognizant BIA and tribal offices constitute reliable evidence from which to ascertain an individual's status as an "Indian." Cheyenne, Inc., supra. Further, contemporaneous corporate documents--such as those provided by Mr. Griffin--provide reliable sources for assessing whether a firm constitutes an eligible Indian economic enterprise. Id.; Navajo Security Co., B-260980 et al., July 17, 1995, 95-2 CPD ¶ 24. In this case, considering the documentation gathered by the agency, including the certifications from the Cherokee Nation and BIA, the corporate documents, and the teaming agreement, as well as the agency's interview with Mr. Griffin and Griffin's proposal, the agency reasonably determined that Dan D. Griffin, P.C., C.P.A., is an eligible Indian economic enterprise. Although the protester disagrees with BIA's determination, it

has not shown, nor does the record reflect, that the agency's determination was unreasonable. Under these circumstances, BIA's determination that the awardee is an eligible Indian economic enterprise is unobjectionable.¹

The protest is denied.

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¹The protester also contends that the awardee is not a responsible contractor. Under our Bid Protest Regulations, we will not review an agency's affirmative determination that a prospective contractor is responsible—that is, capable of successful contract performance—absent a showing of possible fraud or bad faith on the part of contracting officials, or that definitive responsibility criteria in the solicitation have not been met. 4 C.F.R. § 21.3(m)(5) (1995); Inframetrics, Inc., B-257400, Sept. 30, 1994, 94-2 CPD ¶ 138. Because here there is no showing of possible fraud or bad faith, or that definitive responsibility criteria have been misapplied, we will not review this protest contention.